INDEX

	PAGE
Date of Judgment Below	1
Opinions Below	2
Statute Under Which Jurisdiction Is Involved	2
Summary Statement	2
Questions Presented	7
Reasons Relied on for Allowance of the Writ	10
Brief	11
Conclusion	14

U. S. CONSTITUTION

Article IV, Sec. 1	8

Cases Cited

Elkhorn Coal Corp. v. Diets, 225 Ky. 753	11
Industrial Commission of Wisconsin v. McCartin, 330 U. S. 622	12
Johnson v. United States, 186 F. (2d) 120	10
Junior Oil Co. v. Byrd, 204 Ky. 375	11
Kentucky Road Oiling Co. v. Sharp, 257 Ky. 378	11
Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, rehearing denied, 321 U. S. 801	12
Sawyers v. Lena Rue Coal Co., et al., 217 Ky. 500	11
State ex rel. Kresge Co. v. Industrial Commission of Ohio, 157 O. S. 62	14
Wallins Creek Collieries Co. v. Jones, 214 Ky. 775	12

Statutes

	PAGE
K. R. S. 342.065	4, 5, 9
K. R. S. 342.125	4
K. R. S. 342.170	4
K. R. S. 342.265	5
K. R. S. 342.395	4
K. R. S. 342.410	3
K. R. S. 342.415	3
Pamphlet, Kentucky Workmen's Compensation Law Annotated, 1950 (Printed)	13

No. ———

Supreme Court of the United States

OCTOBER TERM, 1951

SEARS, ROEBUCK AND COMPANY,

Petitioner,

v.

CECIL H. BROUGHTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Sears, Roebuck and Company, a corporation (which will be referred to as "Sears"), seeks, by this petition, to review an order of the Court of Appeals for the Sixth Circuit entered March 17, 1952 (R. 163). This order denied a petition by Sears for rehearing of the decision and judgment of that Court entered February 8, 1952 (R. 133). [Judge Miller (R. 163) was "of the opinion that the petition for rehearing should be sustained."] That judgment affirmed a judgment of the District Court of the Eastern District of Kentucky entered June 29, 1950 (R. 53), in favor of the plaintiff in that Court, Broughton, respondent here (who will be referred to as "respondent" or "Broughton"), against Sears for $8921.80 and costs, subject to credits approximating $600.00, for personal injuries

sustained while in the employ of Sears. That part of Sears's unsuccessful defense pleaded and asserted in the trial court, thought to be of interest and importance here, was that exclusive jurisdiction to adjudicate Broughton's claim for personal injuries had been merged into an award of and had been and was vested in the Kentucky Workmen's Compensation Board, to the exclusion of any court (R. 49-50).

The opinion of the Court of Appeals is, we believe, not yet reported. The trial court opinion was oral from the bench (R. 49, 44) and was followed by findings of fact and conclusions of law entered June 29, 1950 (R. 50-53).

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, Title 28, Sec. 1254(1) of the Judicial Code.

This petition is filed in April, 1952, within the ninety day period prescribed by Title 28, Sec. 2101(c), U. S. Code, for filing such petition.

A summary and short statement of the matter involved will be apparent from the opinion of the Court of Appeals (R. 134) and from the dissenting opinion (R. 142), and more fully in the pleadings, particularly paragraph 4 of the answer of Sears (R. 10-13), the plaintiff's motion to strike paragraph 4 of defendant's answer (R. 21), the stipulation of facts with exhibits (R. 23-38), and the supplemental stipulation of facts with exhibits (R. 39-43) on which the case was tried, and the order (R. 44) striking the fourth paragraph as insufficient in law in the light of the stipulation of facts.

The petition (R. 4-6) is a straight-out suit for negligence and a claim for $50,471.30. It makes no reference to the proceedings before and amounts received through the Workmen's Compensation Board. The defendant's answer (R. 9-13) in paragraph 4 denied negligence, pleaded contributory negligence and assumption of the risk (R. 10),

and in paragraph 4 fully set up the proceedings under the Workmen's Compensation Act, Chapter 342, Kentucky Revised Statutes (R. 10-12) as a bar to the maintenance of an action at law against defendant for damages for the plaintiff's injuries. Plaintiff moved to strike this paragraph 4 (R. 21) and the Court struck the fourth paragraph of the answer as insufficient in law in the light of the stipulation of fact (R. 44).

The opinion of the Court of Appeals recites (R. 135):

> "... the controlling issue in this case is whether the employee accepted the provisions of the Workmen's Compensation Act of Kentucky."

and holds, solely because of the employee's infancy, (R. 142):

> "... there was no election by the appellee ... to accept compensation. ..."

In Kentucky, acceptance of the Workmen's Compensation Law is voluntary, optional, and not required of either the employer or employee. The effect of election by the employer not to operate under the Act is, by Sec. 342.410, to subject him to suits for damages for personal injury and, in these, the employer may deny negligence, but not assert defenses of contributory negligence, negligence of fellow servant or assumption of the risk. Likewise, the employee under K. R. S. 342.415 "who does not elect to operate under" the chapter and who proceeds at law as if the chapter did not exist, is subject to all such defenses by the employer.

The accident occurred October 2, 1947 (R. 32). Broughton was then more than twenty years old (R. 60), but not yet twenty-one. He was in the eighth school grade when called to the Army and ranked well both mentally and physically in the Army tests (R. 75-76).

Broughton after accepting on October 28, 1947, compensation by agreement (R. 34) did not sue at law until eleven months later, September 30, 1948 (R. 1). The Kentucky statutes principally involved are:

Section 342.065 K. R. S., (Section 4892 Carroll's Ky. St. Ann.) quoted (R. 137) in the Court's opinion:

> "A minor sixteen years of age or over . . . shall be considered sui juris for the purposes of this Act. . . ."

342.125:

> "Upon its own motion or upon the application of any party interested and a showing of change of conditions, mistake or fraud, the board may at any time review any award or order, ending, diminishing or increasing the compensation previously awarded, within the maximum and minimum provided in this chapter, or change or revoke its previous order, sending immediately to the parties a copy of its subsequent order or award. Review under this section shall be had upon notice to the parties interested and shall not affect the previous order or award as to any sums already paid thereunder."

342.170:

> ". . . If a claim for compensation is made under this section, the making of such claim shall be a waiver and bar to all rights of action on account of that injury or death as to all persons. . . ."

342.395:

> "(4957) Employe's notice of election to operate under this chapter; duration; evidence of election. (1) Election to operate under this chapter shall be effected by the employe by signing the following notice:
>
> " 'I hereby agree with (name of employer) to accept the provisions of the Kentucky Workmen's Compensation Law (KRS Chapter 342).' "

342.265 K. R. S. Section 4931 Carroll's Ky. St. Ann. (R. 136):

> "If the employe and employer reach an agreement conforming to the provisions of this chapter in regard to compensation, a memorandum of the agreement shall be filed with the board, and, if approved by it, shall be enforceable as is herein provided for the enforcement of awards of the board. Nothing herein shall prevent the voluntary payment of compensation in the amounts and for the periods prescribed in this chapter without formal agreement, but nothing shall operate as a final settlement except a memorandum of agreement filed with and approved by the board in accordance with this section or the expiration of the time limit prescribed in KRS 342.185." (A statute requiring notices of claim for compensation to be filed within a year unless payments of compensation have been made voluntarily.)

The District Court held (R. 137) that while an infant may accept the Compensation Act, his acceptance must be made before occurrence of an injury under 342.395; but, that an agreement by an infant, after injury, to accept payments by way of settlement of his claim, though filed with and approved by the Commission

> ". . . was nothing more than a contractual obligation on his part, which, because of his contractual disability, was not binding upon him."

The appellate court opinion concurred in this view (R. id.). Judge Miller (R. 142-143), based his dissent on highest court Kentucky decisions which he cited and on Section 342.065 of the Kentucky statutes, which he read to mean that it placed

> "an infant on the same legal plane as an adult for the purposes of the Act . . ." (R. 143).

Sears's petition for rehearing (R. 145, 156) sought to point out that the majority opinion was erroneous because: (1) it did not follow the Kentucky statutes and decisions requiring the Kentucky Workmen's Compensation Law to be liberally construed so as to bring the benefits of the Act to injured employees; (2) if an agreement by an infant after injury was merely, as the court opinion stated, a contract, it was voidable only and could be voidable, only before an award was made based on the infant's election to accept Workmen's Compensation; that any possible defense was merged in the award as a judgment or record entitled to full faith and credit and on principles of *res adjudicata* and that after the award or judgment, the defense of infancy, and of the contract being voidable by reason of infancy if otherwise a valid defense, was wiped out and could not be interposed; (3) when the Kentucky Workmen's Compensation Board reserved jurisdiction under K. R. S. 342.125 to review the award at any time, it thereby retained exclusive jurisdiction to compensate the particular injury sustained to the exclusion of direct appeal to a court through a suit for damages for redress of the same injury; (4) as to the ability of an infant, apart from Sec. 342.065 K. R. S., if that should be considered relevant, to elect or estop himself, before judgment, that was to be determined by Kentucky, not Federal, law; and (5) the interpretation by the court of K. R. S. 342.065 to the effect that what took place did not prevent Broughton from suing in a court for the same injury for which he had submitted himself to and received an award from the Workmen's Compensation Board, was in conflict with an opinion of the Court of Appeals for the Fourth Circuit and opinions cited therein in the interpretation of similar statutes making an infant *sui juris* for the purposes of Workmen's Compensation Acts.

The questions presented, therefore, are:

1. Where a twenty year old Kentucky minor has, after injury in the course of his employment, made an agreement with the employer as to compensation, on the standard approved form for that purpose (R. 34, Exhibit E) and the agreement is filed with and approved by the Board (R. 35, Exhibit F), and notice of such approval mailed to the parties, and payments are made and accepted thereunder for a substantial period of time, eleven months (R. 1, 34), without demur, and all proceedings are had under and recognizing the jurisdiction of the Workmen's Compensation Board, and where the Kentucky statute (K. R. S. 342.065) provides that such a minor as the injured employee

> "shall be considered sui juris for the purposes of this Act,"

and when the Kentucky statutes and highest court decisions of the state require liberal construction of the Act to afford the employee maximum allowable benefits thereunder, may the injured employee, on coming of age, maintain against the employer, for the same injury, an action in a court of law as if proceedings before the Workmen's Compensation Board, including its award, had not occurred?

The trial and appellate court answered this question, "Yes." It is our contention it should have been answered, "No."

2. May a Federal Court interpret provisions of the Kentucky Workmen's Compensation Act strictly and not liberally to oust the jurisdiction of the Board as to coverage respecting injury to an infant over sixteen years of age, and particularly after award, notwithstanding the Kentucky statutes and decisions of the highest court of that state call for liberal construction?

The court in its decision made no reference to these Kentucky statutes and decisions requiring liberal con-

struction, although the statutes and applicable decisions were emphasized on behalf of Sears and elaborated in its petition for rehearing (R. 145, 148-151). It is the contention of Sears that these Kentucky statutes and decisions should have been considered and that they require an opposite result from that reached by the court.

3. Do the principles of *res judicata* or the full faith and credit section Article IV, Sec. 1, of the United States Constitution, and the Act of Congress implementing it, after an agreement for compensation has been filed with a Workmen's Compensation Board having jurisdiction to approve the agreement (and which, for purposes of the question is assumed to be voidable until award, but not void because of infancy), prevent suit in a court of law for recovery of damages for the same injury?

The Court apparently decided against petitioner here without attaching importance to an award having been made and being a "record" or "judgment," a situation different from that assumed by the Court, i. e. a pending matter not having proceeded to judgment.

It is the contention of petitioner that on principles of *res judicata* and under the Federal Constitution and Act of Congress implementing it, the record or judgment of the Kentucky Workmen's Compensation Board should have been held to be a bar to the maintenance of the action at law culminating in judgment for respondent.

4. When the jurisdiction of a Workmen's Compensation Board respecting an injury is invoked and exercised by mutual consent of the parties to compensate the injury, and the statutes creating the Board and its procedures provide (K. R. S. 342.125) a continuing and complete jurisdiction in the Board on notice to the parties interested, to review any award or order made by it, is not the effect thereof to vest an exclusive as well as continuing jurisdiction in that Board and to oust the jurisdiction of a court respecting the

same matter to allow recovery for the same injury? The effect of the Court's decision is to answer this question, "No." Petitioner contends it should have been fully considered and answered, "Yes."

5. In interpreting K. R. S. 342.065 that a minor over sixteen years old

> "shall be considered sui juris for the purposes of this Act,"

where the minor chooses, as an adult could do, to come under the Act after injury, by agreement with the employer filed with and approved by the Board, is not such action by the minor employee a choice or election with the same effect under K. R. S. 342.065, as interpreted by the Kentucky courts, as if he had been of age? In other words, is not the matter one of ability to make a choice under this statute rather than a matter of estoppel?

The Court considered the contract for compensation and subsequent proceedings before the Board from the point of view of estoppel. Petitioner contends the decision should have turned on whether the minor made sui juris could make an election that would have been binding in the case of an adult, to accept Workmen's Compensation instead of resort to the courts.

6. But, if the question is one of estoppel, should not the Kentucky decisions be followed rather than federal decisions (opinion, R. 139) and is not the attempted repudiation by Broughton of election to be treated as an adult and of representation by him that compensation under the Act would be accepted by him bad faith, which would make principles of estoppel under the Kentucky decisions maintainable against such infant?

The opinion of the Court (R. 139) did not discuss or cite Kentucky cases bearing on estoppel of an infant. Petitioner contends that though the Kentucky cases adduced by it in

support of the petition for rehearing (R. 154) are cases of fraud, as, e.g., misrepresentation of age, there is just as much bad faith here by the infant through his misrepresentation that, having by statute the status of an adult, he will choose to accept and thereafter by accepting compensation and that he will not attempt to rely on his infancy as a means of avoidance and resort to a suit at law.

7. Should not the decision of the Court of Appeals for the Fourth Circuit *Johnson* v. *United States*, 186 F. (2d) 120, 124 (1950), as to prohibitive effect of *sui juris* statutes on minors to proceed under and then repudiate Workmen's Compensation relief, have been followed by the Court, especially when that decision of the Fourth Circuit is buttressed with decisions from eight states, including Kentucky, to the effect that when a statute says a minor shall be *sui juris* for the purposes of the Workmen's Compensation Act, it means just what would be ordinarily understood; i.e., that a minor may do, for the purposes of the Act, whatever an adult could do. The Court did not comment on the conflict with the Fourth Circuit opinion and its supporting decisions of the eight states cited. It is our contention that the opinions conflicting with that of the Court should have been persuasive to induce a result favorable to Sears.

The reasons relied on for the allowance of the writ are:

1. The question involved here is whether under statutes such as the Kentucky Act, K. R. S. 342.065, declaring a minor *sui juris* for the purposes of Workmen's Compensation Acts, the minor may make an election to come under such acts followed by award of judgment of the Board and may accept benefits thereunder and then almost a year later, after coming of age, repudiate his election and sue at law as if no such election had been made. The answer to this question is of great public and general importance, since many states have statutes relating to the legal maturity of minors under the Workmen's Compensation Acts similar to K. R. S. 342.065.

2. The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

3. The Court decided an important question of local law in conflict with the statutes of the state and in conflict with applicable local decisions.

4. It has decided a federal question relating to the effect of an award by a Workmen's Compensation Board, a "record" or "judgment," in a way probably in conflict with applicable decisions of this Court.

5. The Court in sustaining Broughton's right to sue at law and recover damages failed to give effect to the Workmen's Compensation Board award as a judgment amounting to *res judicata.*

6. The decision does not accord the comity which opinions of this Court require to the tribunal having jurisdiction rendering a judgment and reserving jurisdiction to itself to modify or set aside its award at any time when circumstances require, which comity would oust the jurisdiction of any other court to give redress for the same injury.

BRIEF

The dissenting opinion of Judge Miller cites *Junior Oil Co.* v. *Byrd,* 204 Ky. 375, 381 (R. 142-3), as holding an agreement after the accident is a valid and recognized method of electing to accept the provisions of the Kentucky Workmen's Compensation Act. The opinion also quotes *Elkhorn Coal Corp.* v. *Diets,* 225 Ky. 753, 758 (1928), where the court said of Section 342.065:

> "This means that his minority does not affect any agreement that he may make."

Kentucky Road Oiling Co. v. *Sharp,* 257 Ky. 378 (1934), following decision in same case, 244 Ky. 157, 158 Bot. (1931); *Sawyers* v. *Lena Rue Coal Co., et al.,* 217 Ky. 500,

502 (1927); *Wallins Creek Collieries Co.* v. *Jones,* 214 Ky. 775, 782 (1926), third par. syl., are decisions to the effect that whenever, under K. R. S. 342.265 the employer and employee reach an agreement under the provisions of the section and the Board approves it

> "such an agreement in effect becomes the award of the Board."

We also respectfully refer to the petition for rehearing (R. 145-156) and statutes and decisions cited therein.

Broughton's "Answer to Petition for Rehearing" (R. 157-159) seeks to escape the impact of decisions such as *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430 (1943, rehearing denied 321 U. S. 801 (1944) (R. 151), and *Industrial Commission of Wisconsin* v. *McCartin,* 330 U. S. 622 (1947), holding an award of a Workmen's Compensation Board to be a judgment, by pointing out (R. 157-158) that here the "Final Compensation Settlement Receipt," Exhibit H (R. 37), was filed with the Board, but that the record fails to show the receipt was approved by the Board. There are three answers to Broughton's contention:

1. The agreement as to compensation of October 28 (Exhibit E, R. 34-5) on the standard form, Broughton's receipt of October 30, 1947 (Exhibit G, R. 36), and the approval by the Board on November 18, 1947, with notice to the parties thereof on the same date (Exhibit F, R. 35) constitute the submission to the exclusive jurisdiction of the Workmen's Compensation Board and comprise the "award" which is a record or judgment ousting the jurisdiction of any court to entertain an action for redress of the same injury.

2. A reading of K. R. S. 342.265 quoted, *supra,* p. 5 will show that the procedure followed here was correct and vested exclusive jurisdiction in the Kentucky Workmen's

Compensation Board in that the agreement in regard to compensation was filed with the Board, approved by it and so became

> "■enforceable as is herein provided for the enforcement of awards of the board."

The second sentence of this section quoted from by opposite counsel (R. 158) refers to

> "voluntary payment of compensation . . . without formal agreement"

and it is such a payment without formal agreement which cannot operate as a final settlement unless a memorandum of agreement is filed with and approved by the Board. In the Kentucky Workmen's Compensation Law Annotated, 1950 printed pamphlet, including rules, regulations and tables, apparently issued by the Workmen's Compensation Board, under "Forms," at p. 71, appears:

> "No. S. F. 5. (Formerly Form No. 18) This form must be filed with the board as proof of final settlement in accordance with an agreement approved by or an award of the board. (See Section 48, KRS Sec. 342.265.)"

The "Final Compensation Settlement Receipt," Exhibit H, is on the standard form and nothing appears on that form indicating the necessity of approval by the Board of the receipt. It is merely a receipt on the basis of compensation that had been agreed upon and that agreement submitted to and approved by the Board.

3. Exhibit H and the supplemental stipulation of facts (R. 39, 40) show that after the final compensation receipt had been filed with the Board, Broughton returned to work (R. 47), and he and the employer made an agreement February 17, 1948 (Exhibit J, R. 42) after a "Receipt on Account of Compensation" (Exhibit K, R. 43) was filed.

These, too, were on standard Workmen's Compensation Board forms and are further evidence that the jurisdiction of the Kentucky Workmen's Compensation Board respecting this injury continued.

As to our suggested reason 6 for allowance of the writ, the continuing powers and jurisdiction of a Workmen's Compensation Board are characteristic of Workmen's Compensation statutes generally, e.g., as a late example, *State ex rel. Kresge Co.* v. *Industrial Commission of Ohio,* 157 O. S. 62 (March 5, 1952).

CONCLUSION

This case is of great public and general interest. It involves an unusual and regrettable interpretation of a Workmen's Compensation Law in the case of a minor who elected to have the benefits of the law. The Court, we assert with deference, did not follow the statutes and applicable decisions of Kentucky, similar to those of many states, requiring a liberal construction of Workmen's Compensation Acts. It gave no reason for not following these statutes and decisions when giving a restricted and, as it appears to us, strained interpretation of the Act making a minor *sui juris* for the purposes thereof. Such a decision is in conflict with a decision on similar statutes of the Court of Appeals for the Fourth Circuit and of many states referred to therein. The decision did not give the binding effect and comity to the record or judgment of the Workmen's Compensation Board which the Constitution and decisions of this Court require.

The decision, if not reversed, may very well operate unfortunately for minors desirous of coming under Workmen's Compensation Laws. There lump sum awards are the exception. Moreover, if the minor cannot make a binding election to come under and receive compensation under

the Act, the employer will hesitate or refuse to deal with him as coming under the Act. The employer will not wish to take the risk of the employee's repudiation and resort to suit. Likewise, the employee may be found, in a suit, to have no cause of action, either because of no negligence on the part of the employer or because of contributory negligence and other defense which may be available to the employer. The great object of Workmen's Compensation Acts is to avoid these conflicts in the courts between employer and employee. Whether an employee has a cause of action in a suit cannot be determined with certainty in advance of the trial.

For all of the above reasons, we urge that the Court exercise its discretion favorably by allowance of the writ.

Respectfully submitted,

MURRAY SEASONGOOD,
LESTER A. JAFFE,
Counsel for Petitioner.

INDEX

	PAGE
Statement	1
Question Presented	2
Brief	3
Conclusion	6

STATUTES

K. R. S. 342.065	2
K. R. S. 342.395	2

U. S. CONSTRUCTION

Article IV, Sec. 1	5

Cited Cases

Cody, et al. v. Combs, et al., 302 Ky. 596	5
Elkhorn Coal Corp. v. Diets, 225 Ky. 753	4
Harmon v. Smith, 38 F. 482	3
Johnson v. U. S., 186 F. (2d) 120	5
Junior Oil Co. v. Byrd, 204 Ky. 375	4
Ky. Road Oiling Co. v. Sharp, 244 Ky. 157	3
MacGreal v. Taylor, 167 U. S. 688	3
Myers v. Hurley Motor Co., 273 U. S. 18	3
Sanger v. Hibbard, 104 F. 455	3

No. .....

Supreme Court of the United States

OCTOBER TERM, 1951

SEARS, ROEBUCK AND COMPANY,

Petitioner,

v.

CECIL H. BROUGHTON,

Respondent.

RESPONDENT'S OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, Cecil H. Broughton, says that counsel for Sears, Roebuck and Company, herein referred to as "Sears", have substantially stated the facts and pleadings, either directly or by reference to the record, upon which the issues in this case are formed. However, the respondent calls the court's attention to the further fact that the agreement as to compensation (R. 24, subsection 5, and R. 34, Exhibit E) shows that Sears was to pay his regular salary of $26.00 per week temporarily, although the highest amount which could be paid legally under the Compensation Act was $16.90 per week. Receipts show that Sears paid respondent at the rate of $26.00 per week, which was not in ac-

cordance with the Act. (R., 25, subsection 7, R. 36, Exhibit G).

Actually, only two sections of the Kentucky Statutes are directly involved, both relating to workmen's compensation. They are: Section 342.065, KRS, (Section 4892, Carroll's Ky. St. Ann.) which provides in part:

> "A minor sixteen years of age or over . . . shall be considered sui juris for the purposes of this Act . . . "

and Section 342.395, KRS, (Section 4957, Carroll's Ky. St. Ann.), which provides:

> "(4957) Employee's notice of election to operate under this chapter; duration; evidence of election. (1) Election to operate under this chapter shall be effected by the employe by signing the following notice:
>
> " 'I hereby agree with (name of employer) to accept the provisions of the Kentucky Workmen's Compensation Law (KRS Chapter 342).' "

While respondent has contended that neither Sears nor he had elected to operate under the provisions of the Kentucky Workmen's Compensation Law prior to the accident, the United States Court of Appeals for the Sixth Circuit has for the purposes of this case, assumed that Sears had accepted the provisions of the Act. (R. 135). The fact that the respondent was a minor and had not elected to operate under the Act prior to the injury is not disputed. The sole question presented, therefore, is: Has the respondent, a minor, by agreeing to and accepting $26.00 a week (whether as salary or compensation, R. 24 (5) and R. 34, Exhibit E) estopped himself to deny that he had legally elected to be covered by workmen's compensation,

thereby giving the Workmen's Compensation Board the exclusive jurisdiction to pass upon his claim?

The trial and appellate courts answered this question "no". It is our contention that this question was answered correctly and if so, all other questions raised by counsel for Sears must be answered adversely to Sears.

BRIEF

Respondent contends that there are only two ways by which an employee can bring himself within the provisions of the Workmen's Compensation Act. One is by election in writing before the accident as provided in KRS 342.065. This, the respondent did not do. The other is by estoppel under certain circumstances. As pointed out by the appellate court below,

> "An infant is immune from estoppel, except in certain jurisdictions, and then only in cases of intentional fraud — and in other circumstances not here pertinent. See Myers v. Hurley Motor Co., 273 U. S. 18; MacGreal v. Taylor, 167 U. S. 688; Sanger v. Hibbard, 104 F. 455 (C. C. A. 8); Harmon v. Smith, 38 F. 482 (C. C. Minn.)" (R. 139).

Sears does not plead *any fraud or other* wrongful acts on the part of respondent as a defense to this action. The record herein does not indicate any fraud or other wrong doing on the part of Broughton. The agreement between the parties as to compensation was voidable by the respondent and he elected to disaffirm the agreement after he became of age.

In Kentucky Road Oiling Co. v. Sharp, 244 Ky. 157, 57 S.W. (2d) 535; 257 Ky. 378, 78 S.W. (2d) 38 (this case was before the Court of Appeals twice) on the first

appeal, the court virtually held that the employee had signed the register before the accident.

In the case of Junior Oil Co. v. Byrd, 204 Ky. 375, 264 S.W. 846, the court held that where the employer had accepted the Act and the employee had not, the employer may waive employee's failure to accept the Act before the accident, but after having induced the employee to sign the register after the injury and paying him compensation, the employer and its insurance carrier, which had knowledge of the facts, were estopped to deny that the employee had accepted the provisions of the Act.

Neither of the foregoing cases supports Sears' theory of this case, since both of them are based on estoppel and involved adult employees.

The case of Elkhorn Coal Corp. v. Diets, 225 Ky. 753, 9 S.W. (2d) 1100, also relied on by Sears, is distinguishable from this case for the reason that the stepfather of the child employee, who was only eleven years old at the time, had signed the certificate required by statute, representing that the child was more than sixteen years of age and that he was the child's guardian. Both statements were false. In addition, the child signed the compensation register prior to the accident and had knowledge that his employer was operating under the Compensation Act and had, through his guardian, received $221.00 in compensation.

Respondent contends that since he was not estopped to deny that he was under the Act, the Workmen's Compensation Board never acquired jurisdiction over the plaintiff's claim and neither the principles of res judicata nor the full faith and credit section, Article

IV, Section 1, of the United States Constitution and the Act of Congress implementing it, have any application as contended for by Sears. There was no valid award by the Board.

Counsel for Sears places great stress upon the case of Johnson v. U. S., 186 F. (2d) 120. Although the case does make reference to the sui juris status of a minor, it is difficult to understand how Sears can get any comfort out of this case. Johnson, a minor, was a civilian employee on a public vessel of the United States at the time of the injury. He applied for and received compensation under the Federal Employees Compensation Act and later brought suit for damages against the United States, claiming the benefits of the Jones Act, 46 USCA, Section 688. At page 125, the court says:

> "In our opinion the definition of the term 'employee' contained in Section 40 of the Federal Act, 5 U.S.C.A., section 790, to include 'all civil officers and employees of all branches of the Government of the United States' should be taken to extend to minors the benefits of the Act, but not to deprive them of the protection with which the law surrounds persons below the legal age. The result is that the plaintiff should be allowed to proceed with his case under the Public Vessels Act but should be required to credit monies he has received upon any recovery which he may make."

In the case of Cody, et al. v. Combs, et al., 302 Ky. 596, 194 S.W. (2d) 525, the employee was killed in an accident and later, his widow and the employer entered into an agreement as to compensation without the knowledge of the employer's insurance carrier. The insurance carrier intervened and contended that the Workmen's Compensation Board was without juris-

diction to pass on the claim as Cody had not elected in writing or otherwise to accept the provisions of the Act. In construing KRS 342.265, which provides that an agreement as to compensation filed with and approved by the Board, shall be enforceable as provided for the enforcement of awards of the Board, and KRS 342.360, which provides that all policies insuring payment of compensation shall contain a clause to the effect that the insurer shall in all things be bound by and subject to the awards, judgments or decrees rendered against the insured, the court said:

> "These statutes apply only where both the employer and employee have accepted the provisions of the Workmen's Compensation Act in the manner prescribed by the Act. Otherwise, the Workmen's Compensation Board is without jurisdiction to entertain the case and enter an award. Boone v. Willett Distilling Company, 285 Ky. 353, 147 S.W. (2d) 693; Partin's Adm'r. v. Black Mountain Corporation, 237 Ky. 556, 36 S.W. (2d) 1; Kington Coal Mining Company v. Danberry, 228 Ky. 344, 14 S.W. (2d) 1084."

Respondent and Sears did not accept the Act in the manner prescribed by law and the Board had no jurisdiction to approve any agreement as to compensation or to make any award.

It is conceded that the respondent was sui juris for the purpose of accepting the Act before any injury was sustained but that he was not sui juris for the purpose of settling a common law claim after the accident. It is true that our statutes should be liberally construed but this does not authorize the courts to write into the Acts of the Legislature something that is not there.

CONCLUSION

The respondent, a minor, had not elected to accept

the provisions of the Workmen's Compensation Law prior to the accident. He was sui juris for that purpose. The agreement as to compensation was not in accordance with the provisions of the compensation law, and the Workmen's Compensation Board had no jurisdiction over the respondent's claim since he had not elected to accept the provisions of the Act before the accident, and he was not estopped to deny that he had accepted the provisions of the Act.

The amount of the award, approximately $9,000.00, is not questioned either in the circuit court or this court, and it is submitted that Sears' petition for a writ of certiorari should be denied and the judgment affirmed, and we urge the court to do so.

Respectfully submitted,

JOHN T. DIEDERICH,
Counsel for Respondent.

LEONARD C. FIELDER,
Of Counsel.